BEFORE THE IOWA CIVIL RIGHTS COMMISSION

DWIGHT ROBERTS, Complainant,

VS.

IOWA BEEF PROCESSORS, INC., Respondent.

CP#10-82-9137

PROPOSED DECISION

ON August 29, 1988, a public hearing was held in the contested case of DWIGHT ROBERTS Complainant versus IOWA BEEF PROCESSORS, INC. (IBP or Respondent) before lone G. Shadduck, Administrative Law Judge. The Hearing was held at the Iowa Civil Rights Commission, 211 E. Maple Street, Des Moines, Iowa. Present at the Hearing were the Complainant, Dwight Roberts, Assistant Attorney General (AAG), Teresa Baustian, representing the Commission, and Robert L. Pierson, corporate attorney with Respondent, IBP.

After having heard the testimony and reviewing the record and briefs of counsel, the following findings of fact, conclusions of law, recommended decision and order are proposed.

ISSUES TO BE CONSIDERED:

I. WAS COMPLAINANT PERCEIVED TO BE SUBSTANTIALLY HANDICAPPED AND THEREBY A MEMBER OF THE PROTECTED CLASS OF DISABLED UNDER IOWA CODE 601A AT THE TIME OF THE FAILURE TO HIRE BY RESPONDENT?.

II. IF COMPLAINANT WAS A MEMBER OF THE PROTECTED CLASS, WAS HE QUALIFIED FOR THE JOBS FOR WHICH HE APPLIED?

III. IF RESPONDENT PERCEIVED COMPLAINANT TO BE SUBSTANTIALLY HANDICAPPED, WAS THAT PERCEPTION THE REASON FOR NOT HIRING HIM?

FINDINGS OF FACT

1. At the time Dwight Roberts filed his complaint (9-30-82) he was approximately 22 years of age. He had recently graduated from high school. Approximately 4 years earlier (December 1978), he had a pacemaker implantation. He was released from the hospital with the following restrictions: "stay away from microwaves and high voltage electronic motors, no heavy lifting over 80 pounds in constant patterns, and no contact sports." Thereafter he had regular pacemaker checks which were normal. In July 1979, his spells were diagnosed as psychogenic. The next notation on his medical records (12-23-82) was as follows:

> "Present for pacemaker check. He has had the same battery for the last four years. He is functioning well. He is playing basketball, etc. He has no angina or congestive heart failure symptoms." (Respondent's Exhibit 17).

2. On April 26, 1982, Roberts applied for a position with TASCO. IBP, Inc., Pork Division, had just purchased the HyGrade Food Products plant in Storm Lake, Iowa. Their subsidiary, TASCO, was in the process of converting the plant for pork processing and, therefore, seeking workers for temporary construction work. Most of the temporary construction workers, approximately 229, started in June 1982. When the construction was completed, a transition to production was made and IBP advertised for production workers. Some temporary TASCO construction workers remained as production workers for IBP. Approximately 236 additional workers were hired in September 1982 for production work. A description of the production work is found in Respondent's Exhibit 8.

3. On April 26, 1982, when Roberts applied for temporary construction work with TASCO, he was one of approximately 500 applicants. His experience as provided on his application indicated part-time computer programming from November 1978 until May 1980, a practium as a student at Iowa Lakes Community College. The application also showed work as a part-time security guard for Pinkertons. As a security guard, he was scheduled to work at HyGrade. This part-time work took place from November 1980 until July 1981. Roberts' medical history questionnaire revealed that he had 'heart disease -implanted pacemaker 1978," with date of last physician examination on April 1, 1982. The record indicates that, as part of the application process, Roberts was sent to the nurse. Roberts was not hired for one of the temporary construction positions. IBP said they did not hire him because he was not qualified to do the heavy construction work based on his 80# lifting restriction. The construction work typically included brick and block work, mixing cement, lifting, hauling, tearing walls out and putting new walls in, i.e., heavy duty work. Roberts was briefly interviewed as was customary procedure. (T.48)

4. Roberts stated that Julius, the TASCO interviewer, attempted to dissuade him from seeking employment with IBP, "telling him that he shouldn't even be applying, that he shouldn't be working but be home taking care of himself." (Brief p.2,12) The fact is that Roberts alleged that Julius said that at some unidentified time. (Tr. 15-16, and 21-22) The further fact is that Julius testified that he did not make those statements. (Tr.65-66) The testimony of Julius is the more credible. He was no longer an employee of IBP and had nothing to gain or lose from his testimony. Roberts also testified that he received a letter from IBP denying him the position. IBP stated that they do not, as a matter of policy, send out denial letters. Roberts had no documentation to prove he received such a letter.

5. When asked: "Now, with regard to construction work, why did you believe you were qualified for that position?" Roberts replied: "Well, in high school I had part of - I had some courses in woodworking and stuff, but I just thought with enough -- courses in woodworking, I might get a job in construction." (T. 16-17) Furthermore, Roberts' application only listed his college practium computer experience and the part-time security guard position. Even if "woodworking

class" were considered experience for a heavy construction job, TASCO was not informed of that experience.

6. Between April 1982 and December 1982, TASCO and IBP processed 2,525 applications.

7. Complainant has not alleged that TASCO and IBP failed to hire him because he was substantially handicapped. Roberts has alleged, however, that TASCO perceived him to be substantially handicapped when he was not. TASCO believed Roberts to be unqualified for the construction job because he had a lifting restriction and was, therefore, not the most qualified of the applicants considered for the hire.

8. On August 23, 1982, Roberts again filed an application, this time with IBP. This application listed his additional experience of collator with Buena Vista Stationary starting in August 1982, and self-employment in August 1978 as a salesman of Aloe Vera products. Roberts testified he also worked two different places as a janitor. This was not part of the application and therefore, could not have been considered. In August, there was no physical examination nor interview. Roberts stated that the August application was in response to an ad for security guard. (T. 15) The purpose of the August application is not clear in the record, but it is obvious that no action was taken on it.

9. Roberts applied again on September 1, 1982. He checked that he had not previously applied for a job with IBP. It appears that this time, he again was checked by the nurse. It is not clear from the record that Roberts ever applied for production work. He only anticipated that when he applied for the temporary construction job, if hired, he would make the transition into production. (T. 16,20)

In his September 1982 application, Roberts was applying for a security position. He did have experience for this position and when he was interviewed by Bruce Anderson, Industrial Relations person who had just come on board, his application was referred to security. (T. 16) Roberts' 80# lifting restriction was noted on his 9-1-82 application, but no documentation from his doctor as to his status at the time was submitted. (T.20-21) Roberts insists he had a back x-ray in September, but there is no indication of such on either of his physical exam reports. (T. 16,22,3 1)

10. There were over 2000 applicants for the advertised work with IBP. Anderson was in charge of hiring only the production workers. That is why, when he learned of Roberts' interest and experience in a security position, he referred the application to that area. Roberts admits that security was the position for which he was applying.

11. There were three full-time positions and one part-time position in security. Floyd Carver applied for a security position on August 17, 1982. Carver was hired. Carver had many years of State Patrol experience. Kevin Metz and Ronald Petersen had been hired in June 1982, as TASCO employees and continued in security. Pat McKenna was hired in transition from her HyGrade position with Pinkertons' when HyGrade was phased out. Niehaus applied on August 31, 1982, and also started in September 1982 when Petersen left. When HyGrade phased out, the most senior people in security were continued in security with IBP. James Gaes was also hired in

August but only worked a couple weeks. He was transferred to another position because of a nepotism problem. It is noted that Gaes had heart trouble and was hired for the security position. There were no positions open at the time Roberts applied. The people hired to fill those positions were qualified and experienced. [See Respondent's Exhibit 16; Post-Hearing letter dated 9-15-88 with information requested by the All; Tr. 137-138]

12. IBP had an equal employment opportunity policy in effect with specific provisions relating to accommodating the handicapped. (Respondent's Exhibits 9 and 14)

13. During the time at issue, production workers started at $6.00 an hour and security personnel started at $4.35 an hour. (Respondent's Exhibits 12 and 16)

14. On December 2, 1982, Roberts again filed an application with IBP. This occurred after the complaint at issue was filed and will, therefore, not be considered.

CONCLUSIONS OF LAW

1. Complaint CP#10-82-9137, was timely filed, processed and the issues in the complaint are properly before the Administrative Law Judge and ultimately, before the Commission.

2. The applicable statutory authority is Iowa Code section 601A.2(11) (1981) in which disability is defined as:

> ... the physical or mental condition of a person which constitutes a substantial handicap. In reference to employment under this chapter, "disability" also means the physical or mental condition of a person which constitutes a substantial handicap but is unrelated to such person's ability to engage in a particular occupation.

3. Iowa Code 601A.6(l)(1981), provides that it is an unfair or discriminatory practice for any:

> a. Person to refuse to hire, accept, register, classify, or refer for employment ... because of the ... disability of such applicant ... unless based upon the nature of the occupation. If a disabled person is qualified to perform the particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminatory practices prohibited by this subsection.

4. The statutory provision of Chapter 601A has been broadened under the rule-making process to include "perceived" disability. 240 Iowa Administrative Code 6.1 provides:

> 6. l(l) The term "substantially handicapped person" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

5. Roberts does not claim to be substantially handicapped.

It is agreed that the restrictions placed on Roberts because of his pacemaker, i.e., stay away from microwaves and no contact sports, and a 80# lifting restriction do not constitute a substantial handicap. Therefore, 240 Iowa Admin. Code 6. 1(5) is the appropriate rule to consider:

The term "is regarded as having an impairment" means:

> a. Has a physical or mental impairment that does not substantially limit major fife activities but that is perceived as constituting such a limitation.
>
> b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such impairment.

6. Roberts alleged that he had a physical impairment but that the impairment did not substantially limit his major life activities. He further alleged that IBP perceived the impairment as constituting such a limitation. Such perception would place him in the protected class of disabled. It is agreed that Roberts has a physical impairment that does not substantially limit his major fife activities. Did IBP/TASCO perceive that Roberts' pacemaker constituted a substantial handicap? If so, was that perception the reason IBP/TASCO did not hire Roberts?

7. It is important to distinguish between *Perceiving" someone to be disabled who is not disabled and identifying an applicant who is not qualified to do a job. Should the Commission require an employer to sift through 2000 application forms, pull out all those that indicate an impairment or record of impairment, and require that these persons be hired whether or not they are the best qualified? Such a requirement would not only be unreasonable but would wreak havoc in the employment system. Even if there were only five applicants, the employer has the right to him the most qualified applicant. What the employer does not have the right to do is refuse to hire someone because they are disabled as defined by the law.

8. Which persons was the disability law meant to protect? Both the statutory definition and statutory provision for employment make a distinction when the disability is <u>related to</u> the job. If, for example, someone with an artificial leg applies for a job that requires no use of that leg and an employer refuses to hire the person because of the artificial leg, the employer has committed a discriminatory act. If the same person applied for a job which included considerable walking, then the disability is related to the job. In that case, there is an additional consideration: has the applicant, through experience or training, overcome the handicap to the extent that the applicant can perform the essential functions, including "considerable walking," of the job? The employer cannot assume, i.e., perceive, that the artificial leg will make the applicant unqualified. However, when the employer knows the handicapped person is qualified to do the job, the employer still does not have to hire that applicant. The employer can hire the <u>most qualified</u> applicant. The only thing an employer cannot do is to refuse to hire the applicant because the applicant has an artificial leg.

9. There has been an attempt in the past two sessions of the Iowa legislature to pass a bill which would require employers to reasonably accommodate an applicant in order to qualify that applicant for the job. During the first session, such a bill passed and was vetoed by the Governor. During the second session, the bill failed to pass. The Commission has neither the statutory authority or authority under its rules to require employers to accommodate, reasonable or not, applicants who have disabilities directly related to the job and who are not qualified to do the essential tasks of that job.

9. The Iowa Supreme Court set forth what they believed to be consistent with the civil rights statute and their holding in Probasco v. Hy-Vee 420 N.W.2d 433 (Iowa 1988), as they cite Forsi v. Bower, 794 F.2d 931, 934 (4th Cir. 1986), where the court said such legislation:

> assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

10. The burden of proving that he was qualified for the construction work was on Roberts. He had no experience in construction. The record of experience he provided TASCO was that he had taken a course in woodworking. Assuming arguendo, that experience in construction was not necessary or that TASCO hired other applicants who only had a course in high school woodworking, Roberts must then prove that TASCO perceived that his pacemaker constituted a substantial handicap. ONLY IF he is "perceived" to be substantially handicapped does he become a member of the protected class. Roberts has not proved that IBP perceived him as being substantially handicapped.

11. The very real problem of grouping the substantially handicapped (handicap is either not directly related to the work or is directly related but through experience and training the handicapped person has overcome the handicap) with those who have an impairment which is directly related to work and imposes restrictions on their ability to do all of the required tasks of the work, is that such a grouping dissipates the opportunities for the truly disabled who have become qualified in spite of their substantial handicap in order to become integrated into the marketplace.

12. Perceiving someone to be disabled and concluding they are not able to do the work when in fact they are substantially handicapped but can do the work, would be unfair and discriminatory. Perceiving someone to be impaired as related to the work and concluding they are not able to do the work when in fact they are not able to do the work is not unfair or discriminatory. The Civil Rights Act does not require an employer to hire someone who is not qualified to do the job, not because of their race, their sex, their national origin, their religion or their disability. The law is clear that an employer cannot refuse to hire a qualified disabled person because of the disability or the need to reasonably accommodate that disability. Furthermore, an employer can select the

most qualified person from a pool of applicants unless there is an in-place affirmative action program to preferentially hire protected classes.

"Reasonable accommodation" to the truly handicapped is the secondary requirement in disability law. The first requirement is the same as for any other protected class, i.e., equal treatment. Equal treatment means the protected characteristic is not a consideration in hiring when screening applicants for a job. Race, sex, religion, etc. or "disability" cannot be the reason for failure to hire. Qualifications to do the job must be the screening basis. However, to have the singular requirement of equal treatment in the case of the disabled would still allow barriers over which the disabled could not climb. Therefore, reasonable accommodation is essential to overcome obstacles unique to the handicapped which limit opportunities in employment. Such obstacles are the prejudices and attitudes of employers, inaccessibility of information, lack of adequate transportation, and architectural barriers.

Access accommodation must be considered, i.e., installation of ramps, elevators, braille numbers on elevators. The starting point of competition for a job must be the job itself and not getting to the job. The second kind of accommodation which is required is modification of the employment setting. Reassigning nonessential tasks, modifying space and equipment and flexible work schedules. 27 DePaul L. Rev. 953 The law does not require that the job itself be changed . The law is clear that the protected person is one who is "qualified to perform the particular occupation."

Roberts had an impairment with a restriction winch was directly related to the job requirements of construction worker. Roberts did not believe that he was substantially handicapped. He did believe, however, that TASCO/IBP perceived him to be substantially handicapped. If so perceived, he would be a member of the protected class of disabled. It is concluded that IBP did not perceive Roberts as handicapped under the law. His lifting restriction was the factor in his failure to be hired for the construction job. No evidence was presented of jobs that he could do in construction which did not require the lifting. Roberts was not one of the most qualified applicants. Roberts was qualified for the security position. His impairment, perceived or not, was not the reason he was not hired for that position. The reason was that there was no opening. Roberts did not present evidence that there was, in fact, a job opening in security and that he was more qualified than other applicants. Roberts has failed to carry his burden of proof that IBP discriminated against him and this case should be dismissed.

RECOMMENDED DECISION AND ORDER

Respondent, Iowa Beef Processors, Inc., did not commit an illegal discriminatory act when it failed to hire Dwight Roberts.

IT IS THEREFORE ORDERED that Complaint CP# 10-82-9137 is dismissed.

Signed this 23rd day of May 1989.

IONE G. SHADDUCK

ADMINISTRATIVE LAW JUDGE